No. 77-1821

In the Supreme Court of the United States

OCTOBER TERM, 1978

RICHARD A. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JEROME M. FEIT,
SARA CRISCITELLI,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1A-15A) are reported at 576 F. 2d 1065.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1978. The petition for a writ of certiorari was filed on June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment, charging that petitioner engaged in a pattern of racketeering activity involving the solicitation and acceptance of bribes, should have been dismissed because two of the alleged five acts of bribery occurred more than two years before the federal indictment and thus could not have been prosecuted under state law.

2. Whether the indictment failed to apprise petitioner adequately of the factual basis of the racketeering charge against him.

3. Whether the trial court abused its discretion in admitting evidence of acts not charged in the indictment to show petitioner's knowledge, intent, and motive.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c).[1] He was sentenced to five years' imprisonment and a $5,000 fine. The court of appeals affirmed (Pet. App. 1A-15A).

The evidence at trial showed that petitioner, while serving as warden of the Dauphin County Prison in Harrisburg, Pennsylvania, solicited or agreed to accept money on five separate occasions[2] in return for assistance in obtaining favorable treatment for certain inmates. Three of the five bribes were paid for the purposes of preventing the transfer of inmate James Horvath from the county prison to a state correctional institution, securing his enrollment in a work-release program, and obtaining his early release. For these efforts petitioner received a total of $1,225, of which he returned $500 when he was unable to effect Horvath's release as arranged (A. 104a, 114a-115a, 118a-120a, 243a-244a, 247a-254a).[3] Another inmate, Isaac Hawkins, testified

[1]Petitioner was acquitted on one count of perjury and one count of obstruction of justice.

[2]Originally the indictment charged a sixth incident of bribery. The government withdrew the additional allegation at trial (Pet. App. 7A n. 1).

[3]"A." refers to the Appendix in the court of appeals.

that he paid petitioner money to secure an early release (A. 333a-335a), and a third inmate, Michael Lauro, stated that petitioner, through Shermont Bowser, a corrections officer at the prison, offered to procure his early release in exchange for $500 (A. 509-514a).

Petitioner admitted accepting $500 from a friend of Horvath's and personally requesting favorable treatment for Horvath from a local judge, but denied that he accepted funds as payment for his efforts on Horvath's behalf (A. 573a-579a). He further admitted that he knew that Hawkins was scheduled for early release and that he intervened on Lauro's behalf. Again, however, petitioner denied the allegations of bribery (A. 568a, 571a, 590a).

ARGUMENT

1. Petitioner was convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO) of conducting an enterprise through a pattern of racketeering activity that included five bribe solicitations. Two of the alleged acts occurred more than two years before the indictment was filed. The applicable Pennsylvania statute of limitations for bribery is two years, and petitioner argues (Pet. 9-13) that the indictment should have been dismissed because it included acts that were not "chargeable under State law and punishable by imprisonment for more than one year," within the meaning of 18 U.S.C. 1961(1).[4] The court of appeals properly rejected this contention (Pet. App. 3A-4A), and the decision below is consistent with the results reached by other courts that have considered similar claims. The issue does not merit further review by this Court.

[4]Petitioner states (Pet. 10) that three of the alleged acts of bribery were beyond the reach of the state statute of limitations. One of those three acts, however, was withdrawn by the government before verdict (see note 2, *supra*).

Like a number of other federal statutes, RICO refers in part to state law for the purpose of identifying conduct made criminal under federal law. Thus, RICO defines "racketeering activity" to include "any act or threat involving * * * bribery * * * which is chargeable under State law and punishable by imprisonment for more than one year" (18 U.S.C. 1961(1)). The reference to state law is substantive only, *i.e.*, state law is incorporated into the federal statute solely for the purpose of delineating the kinds of behavior involving bribery that will violate federal law. Congress no more intended to adopt state statutes of limitations than it did to incorporate state rules of evidence or procedure. The court of appeals specifically held as much in a case decided several months before the present controversy. *United States* v. *Forsythe*, 560 F. 2d 1127, 1134-1138 (C.A. 3). As the court said in *Forsythe* (560 F. 2d at 1135; footnote omitted):

> RICO is a federal law proscribing various racketeering acts which have an effect on interstate or foreign commerce. Certain of those racketeering, or predicate acts violate state law and RICO incorporates the elements of those state offenses for definitional purposes. State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations; it was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity. To interpret state law offenses to have more than a definitional purpose would be contrary to the legislative intent of Congress and existing state law.

Petitioner attempts to distinquish *Forsythe* on the ground that that case held only that Congress did not directly adopt state statutes of limitations to govern federal prosecutions under RICO. Relying on Judge Aldisert's concurring

opinion in the present case (Pet. App. 7A-15A),[5] petitioner argues (Pet. 11-12) that it remains an open question whether Congress intended to incorporate state statutes of limitations into its definition of a federal offense under RICO. The distinction that petitioner attempts to draw is an illusory one. As explained in *Forsythe*, Congress looked to state law only for descriptions of criminal conduct, not for statutory provisions governing the timing of such conduct in relation to a valid federal prosecution. Petitioner's modified version of the argument rejected in *Forsythe* would still subject RICO enforcement to the vagaries of local limitation periods and would to that extent ignore Congress' emphasis on the special federal interest in dealing with organized criminal activities. Recognition of that interest has led numerous courts to reach results similar to that challenged here, see, *e.g.*, *United States* v. *Brown*, 555 F. 2d 407, 418 n. 22 (C.A. 5); *United States* v. *Revel*, 493 F. 2d 1 (C.A. 5); *United States* v. *Cerone*, 452 F. 2d 274 (C.A. 7), certiorari denied, 405 U.S. 964; *United States* v. *Fineman*, 434 F. Supp. 189 (E.D. Pa.),[6] and petitioner has cited no contrary authority.

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[5]Petitioner disregards the fact that, even under Judge Aldisert's view of the case, his conviction should be affirmed. As petitioner concedes (Pet. 12-13) and the concurring opinion stresses (Pet. App. 7A), at least three incidents of bribery occurred within the state statute of limitations. These acts alone constituted a pattern of racketeering activity sufficient to sustain a conviction under the indictment.

[6]See also *United States* v. *Nardello*, 393 U.S. 286, 293, 296, in which this Court construed the Travel Act, 18 U.S.C. 1952. The Act prohibits traveling or using any facility in interstate commerce to promote or carry on an unlawful activity. "Unlawful activity" is defined to include "extortion * * * in violation of the laws of the State in which committed" (18 U.S.C. 1952(b)(2)). The conduct of appellees in *Nardello* was made criminal by Pennsylvania statutes dealing with "blackmail." (The Pennsylvania law on "extortion" covered only the conduct of public officials, and appellees were private citizens.) Appellees argued that, because the Travel Act referred only to extortion

2. Petitioner further contends (Pet. 13-19) that the indictment was defective in that it failed to apprise him of the specific benefits he allegedly agreed to provide for certain inmates in exchange for the bribes he solicited and received. This contention is groundless.

The indictment charged that petitioner knowingly violated the Pennsylvania bribery statutes on six separate occasions. As to each such occasion, the indictment specified the date on which the bribe allegedly occurred, the inmate allegedly involved, and the amount of money petitioner allegedly received or expected to receive. Following the language of the Pennsylvania statute, the indictment then stated that petitioner accepted or agreed to accept money in exchange for his "decision, opinion, recommendation, vote and exercise of discretion * * *." The court of appeals correctly held (Pet. App. 5A) that "the gravamen of the offense defined * * * [by Pennsylvania law] is the solicitation or acceptance of a bribe, not the delivery of its *quid pro quo*." Accordingly, it was not a fatal defect for the indictment to omit a detailed description of the proposed benefit to be conferred by petitioner in exchange for each of the bribes solicited or received.

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in violation of state law, their violations of the Pennsylvania blackmail statutes did not constitute federal offenses under 18 U.S.C. 1952. This Court rejected the argument, holding that "by defining extortion with reference to state law, Congress [did not intend] also [to] incorporate[ ] state labels for particular offenses. Congress' intent was to aid local law enforcement officials, not to eradicate only those extortionate activities which any given State denominated extortion" (393 U.S. at 293-294). Similarly, Congress could not have intended RICO or other statutes that rely on state law for their definitions of crimjnal conduct to be subject to the various local statutes of limitations rather than the statute of limitations applicable under federal law (see 18 U.S.C. 1961(5) and 18 U.S.C. 3282).

The applicable Pennsylvania statute, 18 Pa. Cons. Stat. Ann. § 4701(a) (1973) (see Pet. App. 2A n. 2),[7] is the state counterpart to 18 U.S.C. 201, which proscribes similar conduct by federal public officials. Under both state and federal law, it is not essential that a public official actually perform the act for which he has accepted a bribe; the gravamen of the offense is the acceptance or agreement to accept money intended to influence official conduct. See *United States* v. *Brewster*, 408 U.S. 501, 527; *United States* v. *Dowdy*, 479 F. 2d 213, 222 (C.A. 4), certiorari denied, 414 U.S. 823; *United States* v. *Jacobs*, 431 F. 2d 754, 759-760 (C.A. 2), certiorari denied, 402 U.S. 950.

To be sufficient, an indictment must inform the defendant of the charges against him and provide a basis for a plea of double jeopardy in the event of a later prosecution for the same offense. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 117; *United States* v. *Debrow*, 346 U.S. 374. It need not provide a detailed account of the conduct constituting the offenses charged. See *United States* v. *Tramunti*, 513 F. 2d 1087, 1113-1114 (C.A. 2), certiorari denied, 423 U.S. 832. Here, petitioner was charged with conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). The indictment informed him that the pattern of racketeering activity contemplated by the grand jury involved his repeated solicitation and acceptance of bribes from inmates in exchange for favors performed in his capacity as warden of the Dauphin County Prison. The indictment further specified and described particular incidents of bribery included in the general pattern of racketeering activity charged by the grand jury. This

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[7]The comparable Pennsylvania provision in effect before June 6, 1973, is reprinted in 18 Pa. Cons. Stat. Ann. App. § 4303 1973). It defines bribery to include a public official's acceptance or agreement to accept money or goods in exchange for his "vote, opinion, verdict, award, judgment, decree, or behavior * * *."

information was adequate to permit petitioner to prepare his defense, for the offense charged was not a particular act of bribery but the conduct of an enterprise through a pattern of racketeering activity. Cf. *Sanabria* v. *United States*, No. 76-1040, decided June 14, 1978, slip op. 15 (allowable unit of prosecution under 18 U.S.C. 1955 is participation in illegal gambling business, not discrete act of gambling). Petitioner himself apparently agrees (Pet. 14-15) that the indictment was sufficient to preclude a second prosecution for the same offense. The constitutional requirements were thus satisfied, and the court of appeals did not err in rejecting petitioner's challenge to the sufficiency of the indictment.[8]

3. Petitioner argues (Pet. 19-28) that the district court erred in permitting the introduction of evidence that, in his capacity as warden, he accepted or demanded money from inmates on occasions other than those listed in the indictment. As the court of appeals correctly held (Pet. App. 6A), the evidence was relevant to petitioner's corrupt intent in seeking and accepting money in the instances charged in the indictment, and therefore was properly admitted under Rule 404(b), Fed. R. Evid.

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[8]Petitioner relies on *Russell* v. *United States*, 369 U.S. 749, but that case does not support his position. *Russell* involved prosecutions for refusing to answer questions in a congressional inquiry. Under 2 U.S.C. 192, such refusals are criminal only if the unanswered questions are "pertinent" to the subject under inquiry by Congress. The indictments in *Russell* "failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated" (369 U.S. at 752). This Court held that the omission rendered the indictments deficient as to the pertinency element of the offense, because the defendants were not informed of the nature of the accusations against them.

Here, by contrast, the act of soliciting or accepting a bribe does not require actual performance of the act for which the consideration was paid. The indictment therefore was not defective in omitting detailed descriptions of the favors petitioner agreed to perform for inmates willing to pay.

a. At trial, a key government witness, Dale Sedeshe, testified that he had paid petitioner sums of money on three occasions to obtain favorable treatment for a friend incarcerated at the Dauphin County Prison. These acts of bribery were among those specified in the indictment. The prosecutor then asked Sedeshe (A. 106a), "Could you tell the jury why it was you felt the issue of money should even be raised?" Sedeshe responded (*ibid.*), "Yes. I, one time before, I was in jail and it helped me out." Petitioner asserts (Pet. 20) that this testimony, combined with earlier evidence that Sedeshe himself had been an inmate at the Dauphin County Prison (A. 95a), was offered to prove petitioner's bad character by suggesting that Sedeshe had had a previous corrupt transaction with petitioner. Contrary to this contention, the evidence was offered to counter the expected defense that, when petitioner accepted money from Sedeshe, he believed it was a gift rather than a bribe (A. 577a-578a, 623a-624a). Sedeshe's testimony was thus relevant to petitioner's knowledge concerning the purpose of the money and his intent in accepting it. See *United States* v. *Cochran*, 499 F. 2d 380 (C.A. 5), certiorari denied, 419 U.S. 1124; *United States* v. *Johnson*, 562 F. 2d 515 (C.A. 8).

In any event, the prejudice suffered by petitioner as a consequence of the challenged testimony was minimal. The district court sustained petitioner's objection to further description of the previous transaction (A. 110a), and it is unlikely that the jury drew any negative inference from Sedeshe's admission that he had once served time in the Dauphin County Prison and his statement 11 pages of testimony later that an offer of money had "helped [him] out" during a previous stay in jail.

b. Charles Myers, the government's final witness, testified that in 1975, in order to secure his early release from the Dauphin County Prison, he paid petitioner $950, at petitioner's request. Myers further

testified that he was released on probation after serving seven or eight days of his original three to 23-month sentence (A. 525a-532a). Like Sedeshe's testimony, this evidence was offered by the government to demonstrate petitioner's knowledge, motive, and intent with respect to the charged offense, and the trial court properly instructed the jury as to the limited use of Myers' similar act testimony (A. 813a). See *United States* v. *Robinson*, 560 F. 2d 507, 514 (C.A. 2).[9]

Petitioner claims, however, that the prejudicial impact of this testimony outweighed its probative value, and that the government deliberately omitted the Myers bribe from the indictment in order to place petitioner at a disadvantage. The determination whether the probative value of evidence outweighs its prejudicial effect is committed to the sound discretion of the district court. *United States* v. *Bloom*, 538 F. 2d 704, 709 (C.A. 5); *United States* v. *Calvert*, 523 F. 2d 895, 908 (C.A. 8), certiorari denied, 424 U.S. 911. Under the circumstances of this case, where petitioner admitted receiving money from inmates but denied accepting bribes, the district court did not err in permitting introduction of Myers' testimony. Moreover, there is no indication that the government deliberately chose to exclude the Myers bribe from the indictment in order to secure a tactical advantage. The government is not required to charge a defendant with every offense it believes the defendant committed. *United States* v. *Lovasco*, 431 U.S. 783, 794; *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363-365. In any event, petitioner received as Jencks Act material a transcript of Myers'

[9] *United States* v. *O'Connor*, C.A. 2 No. 77-1378, decided July 10, 1978, in which the court of appeals ruled that similar act testimony should have been excluded, is distinguishable because in that case "there was no real issue of intent" (slip op. 3869).

testimony before the grand jury and explored his credibility in detail under cross-examination. In light of these factors and the minimization of any prejudice by the careful limiting instructions, admission of Myers' testimony was proper.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JEROME M. FEIT,
Attorneys.
Sara Criscitelli,

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[10] Petitioner's final contention (Pet. 28-29) is that the district court should have granted his motions for a judgment of acquittal at the close of the government's case and after the verdict. The court of appeals correctly characterized this argument as "frivolous" (Pet. App. 6A). The evidence, viewed in the light most favorable to the government, was clearly sufficient to sustain a jury finding of guilt beyond a reasonable doubt. *United States* v. *Rojas*, 554 F. 2d 938, 943 (C.A. 9); *United States* v. *Andrews*, 427 F. 2d 539 (C.A. 5).

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